STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

DEPARTMENT OF HEATH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153370
COA No. 323090
Huron Probate Court
LC No. 13-039597-CZ

In re Estate of IRENE GORNEY,

Defendant-Appellee.

DEPARTMENT OF HEATH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153371
COA No. 323185
Calhoun Probate Court
LC No. 13-000992-CZ

In re Estate of WILLIAM B FRENCH,

Defendant-Appellee.

DEPARTMENT OF HEATH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153372
COA No. 323304
Clinton Probate Court
LC No. 14-028416-CZ

In re Estate of WILMA KETCHUM,

Defendant-Appellee.

DEPARTMENT OF HEATH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153373
COA No. 326642
Bay Probate Court
LC No. 14-049740-CZ

RICHARD RASMER, Personal Representative of Estate of OLIVE RAMSER,

Defendant-Appellee.
/

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DEFENDANTS-APPELLEES' ANSWER TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF ORDERS APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellees in the above-captioned consolidated cases concur with the Department of Health and Human Services' ["DHHS"] request that this Court grant its Application for Leave to Appeal from the Court of Appeals' published split-decision authored by Judge Gleicher in *In re Estate of Irene Gorney*, (Jansen, J, concurring in part, dissenting in part) on February 4, 2016 [COA Nos. 323090, 323185, 323304, 326642], affirming in part, reversing in part, and remanding for further proceedings in these consolidated cases involving estate recovery of Medicaid benefits. As the DHHS' Application shows, *Gorney* involves substantial constitutional questions under MCR 7.302(B)(1); issues of significant public interest involving a state agency under MCR 7.302(B)(2); and jurisprudentially significant questions under MCR 7.302(B)(3). However, on these same grounds, this Court should also grant the Application for Leave to Appeal from the Court of Appeals' decision in *Gorney* filed by the Estate of Rasmer (MSC No. 153356).

Specifically, the full panel of Court of Appeals (Jansen PJ, and Cavanagh and Gleicher, JJ) reversed in part the probate court decisions denying the DHHS' collection efforts, ruling that the DHHS complied with state statutory notice requirements as well as state and federal constitutional due process requirements when the DHHS informed the decedents of estate recovery provisions stated in the Michigan Medicaid estate recovery program [MMERP], MCL 400.112g, in their annual "redetermination" applications beginning in 2012, not when the decedents had initially enrolled in the Medicaid program, as the Estates argued. (*Gorney*, slip op, p 2). In reversing the probate courts' orders in these respects, the Court of Appeals maintained that these statutory notice and due process issues were already raised and decided in *In re Estate of Keyes*, 310 Mich App 266 (2015), lv den 498 Mich 968 (2016). (*Gorney,* slip op,

pp 2, 5). Being bound by *Keyes* pursuant to MCR 7.215(J), the Court of Appeals concluded that MCL 400.112g(3)(e) and MCL 400.112g(7) provided them with sufficient statutory notice of being subject to the estate recovery program when filing an application for redetermination of Medicaid eligibility. (*Gorney*, slip op, pp 5-6). The Court of Appeals also found that *Keyes* controlled the issue whether due process under the federal and state constitutions was violated on the ground that the Estates were not given notification of estate recovery at the time of enrollment in the Medicaid program. (*Gorney,* slip op, pp 7-8).

In its Application, the Estate of Rasmer challenges the Court of Appeals' decision in *Gorney,* holding on the basis of *Keyes* that notice of estate recovery at the time of the Medicaid "redetermination" decision was reasonable under MCL 400.112g and that such notice did not violate the federal and state constitutional due process clauses. Specifically, relying upon *Dow v State of Michigan*, 396 Mich 202 (1976). the Estate argues that *Keyes* wrongly decided the statutory and due process notice issues because the Estate was entitled to receive proper notice of the nature and extent of estate recovery at the time of her enrollment. In its Answer, the DHHS counters that the Court of Appeals correctly decided *Keyes* because the DHHS provided sufficient statutory notice of estate recovery in conformity with MCL 412.112g(7) and afforded the Estate with adequate notice under the state and federal due process clauses. Given the jurisprudential significance of the statutory and constitutional notice issues determined in *Keyes*, this Court should grant the Estate's Application to address whether *Keyes* was wrongly decided.

On the other hand, only the panel majority (Cavanagh and Gleicher, JJ) affirmed in part the probate court orders relating to recovery claims for sums expended between July 1, 2010, and the July 1, 2011 implementation of the MMERP," finding that such collection by "the DHHS would violate MCL 400.112g(5) and the decedents' rights to due process by taking property to

cover a Medicaid 'debt' incurred before the program creating the debt was approved and implemented." (*Gorney,* slip op, p 3). Specifically, the panel majority agreed with the respective Estates' claims that the DHHS retroactively applied the MMERP in violation of their substantive due process rights guaranteeing the protection of their property interests. In pertinent part, the majority noted:

> [W]hen the personal representatives of the estates denied the DHHS' claims, they were not acting to protect their inheritance interests. Rather, the personal representatives stepped into the shoes of the decedents and fought to protect the interests held by the decedents during their lives, and thereby settle the decedents' estates in accordance with their wills or the law. See MCL 700.3703. The decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates. The right to dispose of one's property is a basic property right; one of the "strand[s] in the '" bundle of property rights," which includes "the rights 'to possess, use and dispose of it.'" *Loretto v Teleprompter Manhatten CATV Corp*, 458 US 419, 435 (1982). [*Gorney,* slip op, p 9]

Concluding that the retroactive application of the statute would be unfair before the estate recovery program was implemented, the panel majority found that it "would therefore violate the decedents' rights to due process." (*Gorney,* slip op, p 10). In pertinent part, the majority noted:

> By applying the recovery program retroactively to July 1, 2010, the Legislature deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. The Legislature impinged on the decedents' rights to dispose of their property. Despite that the DHHS does not try to recover until the individual's death, that person's property rights are hampered during his or her life. Between July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," the decedents lost the right to choose how to manage their property." Taking their property to recover costs expended between July 1, 2010 and plan implementation would therefore violate the decedents' right to due process. [*Gorney,* slip op, p 10]

In its Application, the DHHS claims that the implementation of the estate recovery program did not violate the decedents' rights under substantive due process because the decedents were not deprived of a vested property interest and that the estate recovery program is rationally related to a legitimate government interest permitting the DHHS to recover Medicaid

benefits paid before the federal government approved the estate recovery plan. The DHHS also maintains that the effectiveness of cost recovery is at its "sole discretion." In their Answer, the Estates contend that the panel majority correctly recognized that substantive due process rights attach to the protection and preservation of the respective decedents' property interests before death, barring the DHHS from the retroactive implementation of the estate recovery program before its actual implementation date. In addition, as argued by the Estate of Rasmer in its Application, the MMERP cannot be retroactively applied before actual notice was received that the Estates were subject to estate recovery. See *Dow v State of Michigan*, 396 Mich 202 (1976). Further, whether "the costs of recovery exceed the amount of recovery available or if recovery is not in the best economic interest of the state" under MCL 400.112g(4) is subject to judicial review, pursuant to 1963 Const, art 6, § 28 and MCL 24.306, or, alternatively, MCL 600.631; it is not an unreviewable determination at the "sole discretion" of the DHHS.

Considering that the procedural due process issues involving notice of estate recovery presented in *Rasmer* are intimately intertwined with the substantive due process and cost recovery issues presented in the DHHS' Application, both Applications should be granted and consolidated as calendar cases before this Court, affording full briefing and argument to the parties and extending the opportunity to all interested groups to submit amicus briefs on the important public and jurisprudential questions that are presented therein.

COUNTER-STATEMENT OF THE QUESTIONS FOR REVIEW

I. DID THE RETROACTIVE APPLICATION OF THE MICHIGAN MEDICAID ESTATE RECOVERY PROGRAM ("MMERP") VIOLATE SUBSTANTIVE DUE PROCESS UNDER 1963 CONST, ART 1, § 17 AND US CONST, AM XIV?

The Court of Appeals' panel majority answered:	Yes
The DHHS answers:	No
The Estates answer:	Yes
This Court should answer:	Yes

II. IS THE DHHS' COST-EFFECTIVENSSS DETERMINATION OF ESTATE RECOVERY SUBJECT TO JUDICIAL REVIEW PURSUANT TO 1963 CONST ART 6, § 28 AND THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT ("APA"), MCL 24.306, OR, ALTERNATIVELY, THE REVISED JUDICATURE ACT, MCL 600.631?

The Court of Appeals' panel majority answered:	Yes
The DHHS answers:	No
Defendant Estates answer:	Yes
This Court should answer:	Yes

STATEMENT OF FACTS

In *Gorney*, the Court of Appeals stated in pertinent part:

> "In 1965, Congress enacted Title XIX of the Social Security Act, commonly known as the Medicaid act. This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693 [2010] . . .In 1993, Congress required states to implement Medicaid estate recovery programs. 42 US 1396p(b). In 2007, the Michigan Legislature passed 2007 PA 74, which added MCL 400.112g through MCL 400.112k to the Michigan Social Welfare Act, MCL 400.112g(1). The legislation empowered the DHHS to "establish and operate the Michigan estate recovery program [MMERP] to comply with" 42 USC 1396p. MCL 400.112g(1). MCL 400.112g(5) required approval by the federal government before the MMERP would be "implement[ed]." Michigan finally received approval from the federal Centers for Medicare & Medicaid Services (CMS) for its program (referred to as a State Plan Amendment) on May 23, 2011, and the department circulated instructions to implement the plan on July 1, 2011 . . . The CMS approved this State Plan Amendment in May 2011. The letter attached a form titled "Transmittal and Notice of Approval of State Plan Material." The form indicated that the CMS "received" Michigan's "Proposed Policy, Procedures, and Organizational Structure for Implementation" of a Medicaid estate recovery program on September 29, 2010, approved it on May 23, 2011, and, as to the CMS, deemed July 1, 2010 the "effective date" of Michigan's recovery program. . . . [*Gorney*, slip op, p 3]

As to the issues under consideration, the Court of Appeals further stated:

> In the current cases, the decedents began receiving Medicaid benefits after the September 30, 2007 of 2007 PA 74. It is undisputed that the initial Medicaid applications (form DHS-4574) filed by the decedents, or a personal representative on their behalves, contained no information about estate recovery. However, it is also undisputed that in order to remain entitled to Medicaid benefits, each applicant was required to submit a form DHS-4574 annually for a "redetermination" of eligibility. Each new DHS-4574 contained a section entitled "Acknowledgments," which the applicant certified that he or she "received and reviewed."
>
> At some point during 2012, all four decedents' personal representatives submitted a DHS-4574 as part of the redetermination process. . . . . As with previous applications and redeterminations, each decedent personal representative signed the statement affirming that he or she had received the acknowledgments, which included the provision on estate recovery.
>
> Following each decedent's death, the DHHS served claims on the estate seeking to recover the amount the department had paid in Medicaid benefits since July 1, 2010. In each case, the estate denied the claim and the DHHS filed suit in probate court. The

> estates argued that because the decedents had not received proper notice about estate recovery when initially enrolling in the Medicaid program, the DHHS had failed to comply with statutory notice requirements and violated due process rights. The estates further contended that the DHHS violated their rights by seeking recovery of benefits dating back to July 1, 2010, one year before any notice was provided to the recipients. This precluded recovery, the estates contended. In all four cases, the probate court rejected the DHHS' claims for recovery against the estates. . . .

In *Gorney*, the Court of Appeals also stated in pertinent part,

> The Ketchum Estate also asserts that the DHHS sought recovery in violation of MCL 400.112g(4), which precludes the department from "seek[ing] Medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." In support of this argument, the estate contends that its sole asset was a home sold for $30,000, and that the estate's value was whittled away by funeral expenses, administration costs, and certain exempted items.
>
> We note that the probate court did not consider this issue on the record and the estate's appellate argument is cursory. The statute provides no guidance on the application of MCL 400.112g(4). MCL 400.112j(1) gives the DHHS authority to "promulgate rules for the [MMERP]." The Bridges Administrative Manual, BAM 120, p 7, provides: "*Recovery will only be pursued if it is cost-effective to do so as determined by the Department at its sole discretion.*" The Legislature did not direct the DHHS to act "at its old discretion" and we located no DHHS publication describing how such determinations are made.
>
> That the cost-effectiveness decision is made at the department's "sole discretion" does not preclude all judicial review . . . . [*Gorney*, slip op, pp 6-7] (Emphasis added.)

ARGUMENT

I. THE RETROACTIVE APPLICATION OF THE MICHIGAN MEDICAID ESTATE RECOVERY PROGRAM [MMERP] VIOLATED SUBSTANTIVE DUE PROCESS UNDER 1963 CONST, ART 1, § 17 AND US CONST, AM XIV.

A. Standards of Appellate Review

This Court reviews questions of constitutional law de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277 (2013). Issues of statutory interpretation are also reviewed de novo. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 57 (2014). "The goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id.* at 59 (quotation marks and citation omitted). Statutes are interpreted as a

whole, and words or phrases are interpreted in consideration of their context and purpose in the statutory scheme. *Id.*

B. Legal Discussion

It is a foundational principle of American constitutional law that governmental action affecting an individual's property owned during his or her lifetime is subject to constitutional limitations under the Due Process and Takings Clauses of the state and federal constitutions. See The Federalist No. 10 at 78 (J. Madison)(stating that the protection of property was "the first object of government"). Specifically, the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article 1, § 17 of the Michigan Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. *Elba Twp, supra,* 493 Mich at 288. "The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings v Grattan Twp*, 257 Mich App 154, 173 (2003).

(1) Retroactivity is Disfavored

As a general rule, there is a presumption against retroactive legislation. *Eastern Enterprises v Apfel, 5*24 U.S. 498, 532-34 (1998) ("Retroactivity is generally disfavored in the law . . . .). Because there is a presumption against retroactive legislation, the Social Security Act does not generally give the agency the power to promulgate retroactive regulations. *Bowen v Georgetown Univ Hosp*, 488 US 204, 213 (1988).

The controlling case addressing retroactivity is *Landgraf v USI Film Prods*, 511 US 244 (1994), where the U.S. Supreme Court found that there was a long-established presumption against retroactive legislation. Specifically, the Court stated: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to

conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265. Further, the Court stated that there is a presumption against retroactivity because prospectivity "accords with widely held intuitions about how statutes ordinarily operate" and "will generally coincide with legislative and public expectations." *Id.* at 272. However, the Court noted that "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. Specifically, the Court observed:

> A statute does not apply "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment. . . ., or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges have "sound . . . instinct[s], . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." [*Id.* at 269-270(internal citations omitted).

In analyzing retroactivity issues, the Court set forth the following framework:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. [*Id.* at 280].

See also *Usery v Turner Elkhorn Mining Co*, 428 US 1, 15 (1976)(holding that due process requires an inquiry into whether the legislature acted in an arbitrary and irrational way in enacting a retroactive law); *General Motors Corp v Romein*, 503 US 181, 191 (1992) ("Retroactive legislation . . . can deprive citizens of legitimate expectations.").

(2) Retroactive Application of the Michigan Medicaid Estate Recovery Program Violated Substantive Due Process.

In the present consolidated cases, the panel majority in *Gorney* correctly determined that implementation of the estate recovery program could not be applied retroactively. Specifically, the panel majority, relying upon the reasoning and results in *In re Estate of Burns*, 131 Wn2d 104; 928 P2d 1094 (1997) and *Estate of Woods v Arkansas Dep't of Human Servs*, 319 Ark 697; 894 SW2d 573 (1995), stated in pertinent part:

> The same unfairness exists here. By applying the program retroactively to July 1, 2010, the Legislature deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. The Legislature impinged on the decedents' rights to dispose of their property. Despite that the DHHS does not try to recover until the individual's death, that person's property rights are hampered during his or her life. . . (Gorney, slip op, p 10).

As the panel majority recognized, what is paramount under the rule of law is the right to preserve and protect one's assets during one's lifetime; the estate recovery program does not alter that foundational legal proposition. See *In re Shah*, 257 AD2d 275; 694 NYS2d 82 (NY App Div 2 1999) (noting that "[t]he complexities of the Medicaid eligibility rules . . . should [not] blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets). Here, the retroactive application of the estate recovery program gives short shrift to well-entrenched individual property rights and the ability of people to make informed planning decisions. See *Eastern Enterprises, supra*, 524 US at 556-57 (Breyer, J. dissenting)("A law that is fundamentally unfair because of its retroactivity is law which is basically arbitrary.")

Further, the panel majority correctly recognized that retroactive application of the estate recovery statute is contrary to fundamental notions of justice and fairness. At bottom, fundamental fairness requires the preservation of settled expectations relating to the protection of

an individual's assets and that proper notice be given of the effect of new laws. *Landgraf, supra*, 511 US at 265. By law, the MMERP cannot be applied before its federal approval date. See MCL 400.112g(5). Further, as the Estate of Rasmer argues in its Application for Leave to Appeal (MSC No. 153356), pursuant to Due Process Clause of the Fourteenth Amendment, the MMERP cannot be retroactively applied until the Estates received actual notice of the estate recovery program. See *Dow v State of Michigan*, 396 Mich 202 (1976). Thus, to apply the estate recovery statute retroactively is fundamentally unfair because it would affect the protected legal status of the decedents' assets while they were alive. *Id.* at 266 ("Due Process Clause . . . protects the interests . . . that may be compromised by retroactive legislation.") Here, retroactive application of the MMERP would interfere with protection and preservation of an individual's assets, depriving people of the liberty to act with foresight in planning and organizing their lives. Simply put, Medicaid planning allows individuals to protect and preserve their assets from governmental overreach and then distribute them in accordance with their wishes.

Throughout its Application, the DHHS wrongly treats the decedents' constitutionally protected property rights as mere inheritance rights that exist as a matter of "legislative grace." (Application, pp 3-4, 15-16, 19-23). Mischaracterizing the nature of the constitutionally protected property rights at issue, the DHHS thus attacks a "straw man," declaring that "there is no due-process protection" in leaving an inheritance (Application, p 16). Similarly, there is no legal basis for the DHHS' wild assertion that the panel majority, by refusing to give retroactive application of the estate recovery act, "creat[ed] a right that cannot be legislatively impaired * * * for the sole purpose of preserving an inheritance." (Application, pp 16, 19). Rather, the property rights that cannot be "legislatively impaired" are individual rights to preserve one's own assets against the government's retroactive application of the law. See *Landgraf, supra*.

Nevertheless, the DHHS asserts that "the effective date of the Medicaid State Plan does not involve retroactivity – it merely confirms an obligation existing since September 2007. MCL 400.112k." (Application, p 32). In support, the DHHS' relies upon *United States v Carlton*, 512 US 26 (1994), a tax case in which the estate executor took advantage of a tax deduction that Congress had specifically created to encourage people to sell a company's stock to that company's stock ownership plan ("ESOP"). *Id.* at 28. As a result, in 1986, Mr. Carlton sold the stock to the ESOP for a loss in order to get the benefit of the tax deduction. *Id.* However, Congress then repealed not only the tax deduction in 1987, but also applied that repeal retroactively, costing the estate more than $600,000. *Id.* at 28-29. In *Carlton*, the United States Supreme Court rejected a due-process challenge on retroactively applying the 1987 tax law amendment to transactions that the taxpayer made in 1986 while relying upon the pre-amendment tax law. Specifically, the Court held that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." Id. at 33.

The present cases are not tax cases, and should not be treated as such. Thus, *Carlton* is clearly distinguishable from the present cases involving Medicaid estate recovery actions. Specifically, unlike *Carlton*, the present cases involve constitutionally protected property rights relating to the decedents' assets before the effective date of the estate recovery statute, not a promised tax deduction or a claim to favorable tax treatment.

II. THE DHHS' COST-EFFECTIVENESS DETERMINATION OF ESTATE RECOVERY IS SUBJECT TO JUDICIAL REVIEW PURSUANT TO 1963 CONST ART 6, § 28 AND THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT ("APA"), MCL 24.306(1), OR, ALTERNATIVELY, THE REVISED JUDICATURE ACT ("RJA"), MCL 600.631.

A. Standard of Appellate Review

See Issue I, *supra*.

B. Legal Discussion

The 1963 Michigan Constitution guarantees review of all administrative decisions that are judicial or quasi-judicial in nature. See generally LeDuc, *Michigan Administrative Law* 8:01-8:21 and 9.01-:52 (2001 ed.) and LeDuc, *Michigan Administrative Law Revised Edition* (8:01 - 8:10 and 9:01- 9:55 (2015 ed.) (providing a thorough analysis of judicial review of agency action). Specifically, Article 6, § 28 of the 1963 Michigan Constitution provides in pertinent part:

> All final decisions, findings, ruling and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . .

Pursuant to 1963 Const, art 6, § 28, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and its factual findings are "'supported by competent, material and substantial evidence on the whole record.'" *Viculin v Dep't of Civil Serv*, 386 Mich 375, 384 (1971), quoting Const 1963, art 6, § 28. Ruling that preclusion of judicial review in unconstitutional when Article 6, § 28 applies, this Court in *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 97 (2011) expressly held that "the Michigan Constitution guarantees judicial review . . . and this guarantee may not be jettisoned by statute."

Accordingly, except where some other scope of review is expressly provided for by statute or the constitution, judicial review of decisions of an administrative agency is limited to determining whether a party's rights have been prejudiced because the agency's decision misapplied substantive or procedural law, was arbitrary, capricious, or an abuse of discretion, or

was not supported by competent, material, and substantial evidence on the whole record. MCL 24.306(1). Alternatively, where an appeal or other judicial review has not otherwise been provided by law, an appeal from an order or decision of an agency is authorized to the circuit court. MCL 600.631.

(1) The DHHS' Cost-Effectiveness Determinations Are Subject to Judicial Review.

MCL 400.112g(1) provides in pertinent part that "the department of community health [DHHS] shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in section 1917 of title XIX." MCL 400.112g(4) further provides: "The department of community health shall not seek Medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." As the Court of Appeals noted, MCL 400.112j(1) gives the DHHS authority to "promulgate rules for the Michigan medicaid estate recovery program according to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328." Pursuant to the APA, the Bridges Administrative Manual, BAM 120, p 7, provides: "Recovery will only be pursued if it is cost-effective to do so as determined by the Department at its sole discretion."

The question presented here is whether the DHHS' decisions under MCL 400.112g(4) are subject to judicial review. Although MCL 400.112g(4) is silent about the availability of judicial review, the administrative regulation declares that such decisions are unreviewable as they are "determined by the Department at its sole discretion." However, as LeDuc explains:

> If the underlying statute is silent or if its review provisions are incomplete . . . then depending on the nature of agency action and whether it is a state or local agency, the APA may control view, or it may be subject to the RJA. [*Michigan Administrative Law*, Method and Court of Judicial Review, § 8:04, pp 558-59 (2001 ed.)]

Here, it is the Estates' contention that, like other administrative agency actions, the DHHS' decisions to pursue estate recovery based upon its determination that the costs of recovery do not exceed the amount of recovery available or that recovery is in the best economic interest of the state should be subject to the judicial review pursuant to 1963 Const, art 6, § 28 and MCL 24.306(1), or alternatively, MCL 600.631. As the Court of Appeals recognized, "[t]he Legislature did not direct the DHHS to act 'at its sole discretion' and we located no DHHS publication describing how such determinations are made." *Gorney*, slip op, p 6.

Nevertheless, the DHHS argues that "[c]ost-effectiveness of recovery is a matter of agency discretion, not judicial determination," and that it is subject to review only by the Legislature pursuant to MCL 400.112j(2). (Application, p 33). However, a cursory inspection shows that MCL 400.112j(2) does not address whether "cost-effectiveness of recovery is a matter of agency discretion, not judicial determination." Specifically, MCL 400.112j(2) provides:

> Not later than 1 year after implementation of the Michigan Medicaid estate recovery program and each year after that, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over department of community health matters and the senate and house fiscal agencies regarding the cost to administer the Michigan medicaid estate recovery program and the amounts recovered under the Michigan Medicaid estate recovery program.

Clearly, there is nothing in the statutory language of MCL 400.112j(2) that addresses the question at hand.

Further, although the DHHS has broad authority to establish policies and procedures, "an agency policy is still required to be within the matter covered by the enabling statute, comply with the underlying legislative intent, and not be arbitrary or capricious." *Pyke v Dep't of Social Services*, 182 Mich App 619, 632 (1990). "Although agencies are authorized to interpret the statutes they are charged with administering and enforcing, agencies may not do so by

promulgating rules that conflict with the statutes they purport to interpret." *Chrisdiana v Dept of Comm Health*, 278 Mich App 685, 688 (2008), citing *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240-241, 243-244 (1993). Simply put, there is no statutory warrant for the DHHS' declaration that its cost-effectiveness determinations are within its "sole discretion," and hence unreviewable. Moreover, the DHHS' claim that estate recovery decisions regarding cost effectiveness are unreviewable directly conflicts with the Article 6, § 28 of the Michigan Constitution, and MCL 24.306(1) or, alternatively, MCL 600.631. Given that there are jurisprudentially significant questions before this Court involving the applicable method and scope of judicial review relating to DHHS' cost-effectiveness determinations of estate recovery under MCL 400.112g(4), it is important that this Court address this issue in order to provide the necessary direction to the bench and bar on these matters.

(2) Estates and Protected Individuals Code ("EPIC") Allows for the Recovery of Attorney Fees and Costs in Defending against the DHHS' Estate Recovery Actions.

Finally, contrary to the DHHS' claim (Application, p 34), the Estates maintain that they are entitled to reasonable attorney fees defending against the DHHS' estate recovery efforts as justifiable administrative costs under MCL 700.3805. As the DHHS recognizes, MCL 700.3805 provides that the DHHS' "estate recovery claim is paid after the personal representative, his or her attorney, or both are reimbursed for any fees and costs incurred in preventing estate recovery." (Application, p 36). Further, the DHHS correctly notes that MCL 700.3703(1) imposes a fiduciary duty upon the personal representative to act in the best interest of the estate, including allowed claims. Nevertheless, while the DHHS asserts that its efforts in pursuing "[r]ecovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and *any legal work dealing with the claim*, or if the recovery amount

is above a $1,000 threshold" (Application, pp 34-35, citing Medicaid State Plan 4/1/2012, 4.17-A, p 3)(emphasis added), the DHHS inconsistently claims that the costs of "any legal work dealing with the claim" incurred by the Estates should ***not*** be considered in making the determination whether estate recovery is "cost-effective." However, to be "authorized by law," cost recovery efforts under MCL 400.112g(4) are subject to the relevant statutory provisions of Estates and Protected Individuals Code (EPIC), MCL 700.3101-MCL 700. 3988, particularly MCL 700.3805 and MCL 700.3703(1). See MCL 400.112h, referencing MCL 700.1107. Thus, as matter of law, the DHHS' cost-effectiveness determination of estate recovery must comply with provisions of EPIC allowing for the recovery of legal fees and costs incurred in defending estates against the DHHS' estate recovery actions.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing, this Court should GRANT the Plaintiff-Appellant's Department of Health and Human Services' Application for Leave to Appeal under 7.302(B)(1), (2) and (3), along with *In re Estate of Olive Rasmer* [S Ct. No. 1553356], and place these cases on calendar call to allow for full briefing and argument. Above all, it is vitally necessary to the bench and bar that this Court provide a coherent and systematic analysis of the interrelated issues of notice, retroactivity, and judicial review of the DHHS' cost-effectiveness determinations of estate recovery under the Michigan Medicaid Estate Recovery Program.

Respectfully Submitted,

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